

20177

IN THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

RY WHEELER HOLLEY,
Appellant,
v.
A E. CHEUVRONT, et al.,
Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF CALIFORNIA

APPELLEES' BRIEF

FILED

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U.S. DISTRICT COURT

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JURISDICTIONAL STATEMENT

The United States District Court has jurisdiction
entertain the petition of a state prisoner for a writ of
habeas corpus. 28 U.S.C. § 2241a. Such a petition was
filed on March 1, 1965.

This court has jurisdiction to review a final
order of a judge of the federal district court denying a
writ when a certificate of probable cause has been filed.
28 U.S.C. § 2253. On May 4, 1965, the petition for
habeas corpus was denied. A certificate of probable cause

issued by the Honorable Leon R. Yankwich on May 13, 1965.

STATEMENT OF FACTS

It appears from the petition before the lower federal court and the one presented to the Superior Court of the State of California for the County of Madera, that appellant entered a plea of guilty to a charge of manslaughter. He was represented by counsel at his arraignment, plea and at the time sentence was imposed.

SUMMARY OF APPELLANT'S CONTENTIONS

As we noted in our response to the court below, we were not positive just what appellant was asserting as a federal issue. (Response p. 4.) However, it is clear from appellant's opening brief presented to this court that he has but one complaint. He states:

"The only question here involved [sic], as to whether or not the appellant is entitled to appeal from the order denying appellant's petition for a Motion to vacate and set aside the judgment [sic] of conviction." (App. Op. Br. p. 3.)

APPELLEES' POSITION

We contend that the lower federal court was correct in concluding that appellant is not entitled to a writ of habeas corpus and in dismissing Erma E. Cheuvront, Clerk of

era County, as a party respondent.

ARGUMENT

APPELLANT PRESENTS NO FEDERAL ISSUE

Appellant entered a plea of guilty to manslaughter. Sentence was imposed on November 8, 1963. (Petition p. 2.) or about October 9, 1964, he attempted to file a notice of appeal. (App. Exh. E.) His notice was not accepted because the 10 day appeal period had lapsed. Rule 31(a), Calif. Rules of Court. Appellant was told how to obtain relief from his default. (App. Exh. E.)

Next, appellant made a motion on October 20, 1964, to vacate and set aside his judgment of conviction. This motion was denied in the Superior Court of the State of California for the County of Madera. (App. Exh. C.) He attempted to appeal from the denial of his motion. (App. Exh. D.) Apparently his notice of appeal was received by the Clerk of Madera County after the 10 day appeal period expired. Rule 31(a), Calif. Rules of Court. The clerk very clearly told appellant once again how to petition the appellate court for relief from his default. (App. Exh. E.) and letter dated January 20, 1965.)

Appellant's complaint is that the clerk should have accepted his late notice of appeal from the denial of his motion to vacate. Under the rules, the clerk was

le to accept a late notice. That refusal might have bearing in determining whether appellant had exhausted remedies. It, however, does not in and of itself present a federal issue. Appellant does not allege that he has asked an appellate court of this state for relief from his failure to file a timely notice of appeal. The California Supreme Court has demonstrated a high degree of liberality in granting such relief.

See People v. Krebs, 62 A.C. 609, 43 Cal. Rptr.

331 (1965);

People v. Curry, 62 A.C. 211, 42 Cal. Rptr. 17 (1965).

Appellant does not assert that he has attempted to secure relief from his plea of guilty by filing a petition for a writ of habeas corpus with the California Supreme Court or from the California District Court of Appeal. Both of these courts have concurrent and original habeas corpus jurisdiction. Calif. Const. Art. VI, §§ 4 and 4(b).

Obviously he has not exhausted all his presently available state remedies. Exhaustion is a prerequisite to review by this court.

Fay v. Noia, 372 U.S. 391, 435 (1963);

Morehead v. California, 339 F.2d 170, 171 (9th Cir. 1964);

Rose v. Dickson, 327 F.2d 27, 28 (9th Cir. 1964).

Very properly Erma E. Chevront was dismissed as

party respondent. (Order denying petition for writ of habeas corpus.) Said party does not have custody of appellant. A petitioner in habeas corpus seeks his release from custodian. Morehead v. California, supra, 339 F.2d , 171 (9th Cir. 1964). This is just another way of saying that petitioner's complaint does not state a general issue.

CONCLUSION

There being no merit to appellant's contentions, respectfully request that the decision of the lower court be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance therewith.

/s/ William L. Zessar
WILLIAM L. ZESSAR

